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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 799.

FRED FERGUSON,
Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF MISSOURI.

BRIEF FOR RESPONDENT IN OPPOSITION.

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STATUTE

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OPINION BELOW.

The opinion of the Supreme Court of Missouri *en banc*, adopting the opinion of Division One of that Court, is reported at 307 S. W. 2d 385.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether this Court should review a decision of the Supreme Court of Missouri affirming the judgment of the trial court, which directed a verdict for respondent at the close of petitioner's case, when the record shows that the judgment below represents neither an unreasonable appraisal of the facts nor an abuse of judicial discretion in determining that the evidence adduced was insufficient to make a submissible case.

2. Whether there was substantial evidence from which there could reasonably be inferred actionable negligence on the part of the employer in failing to furnish a reasonably safe place to work, when a railroad employee's own proofs demonstrate that his duties did not require him to be at the place of alleged injury and that such injury resulted from his voluntary act in choosing such place to perform his duties, and from his voluntary actions thereafter.

STATUTES INVOLVED.

The pertinent provisions of the Federal Employers' Liability Act (35 Stat. 65, as amended, 36 Stat. 291, 53 Stat. 1404, 45 U. S. C., Sections 51, *et seq.*), which are set forth in Appendix, *infra*.

STATEMENT.

This litigation involves an action for damages on account of injuries allegedly sustained by petitioner while employed by respondent railroad as a lamp tender in respondent's yards at Joplin, Missouri. Petitioner pleaded several separate grounds of negligence (R. 5, 6). Subsequently he abandoned all of the charges of negligence except the alleged failure to furnish him a reasonably safe place to work in that there was no guard rail around a ditch. Respondent denied the allegations of negligence and pleaded petitioner's negligence (R. 9, 10).

Petitioner testified that while employed as a lamp tender in respondent's yards at Joplin, Missouri, on May 21, 1954, he stepped backwards from a sidewalk into a ditch (R. 40, 70, 82). This occurred about nine o'clock in the morning on a "moderate-like spring day." (R. 36, 37). Petitioner knew the ditch was there (R. 69). He had squatted on the sidewalk 13½ feet from the east rail of respondent's track to clean a switch stand lamp (R. 66, 67, 79, 84).

He could have chosen any place to clean the lamp—at many places where he cleaned switch stand lamps there were no sidewalks on which to clean them (R. 85). As far as the sidewalk was concerned, he could have chosen any other place thereon, in either direction therefrom and away from the ditch (R. 85, 86). The switch stand, sidewalk and ditch were located under the west edge of the old overpass or viaduct on East Seventh Street (R. 23, 31). The switch stand was 6 feet and 4 inches east of the east rail of the track and north of the sidewalk (R. 24, 65). The ditch was on the south side of the sidewalk (R. 24).

Petitioner testified that this concrete sidewalk was a public sidewalk (R. 83). The sidewalk ran generally east and west and respondent's railroad track ran north and south where it crossed the sidewalk (R. 80, 81). Petitioner had cleaned lamps on this sidewalk on previous occasions but not "back by the ditch." (R. 68, 69). There was no guard rail there at any time during the eleven years he worked as lamp tender (R. 71). There had been a guard rail at one time on the retaining wall, 16 feet from the east rail of the track, but it was removed about 1941 (R. 23, 76).

While squatting on the sidewalk, petitioner heard a train, looked up, and saw the passenger train approaching on respondent's track about 200 feet away (R. 38, 39). The train was moving slowly, approximately 8 to 10 miles per hour (R. 84, 143, 154). It was coming around the curve from the north (R. 38, 67). One of petitioner's duties was to make a "running inspection", which meant watching the train as it passed (R. 70, 71). Petitioner testified that in order to make this inspection he would have to be at least 18 to 20 feet from the east rail of the track (R. 79). To remove himself farther from the track for the purpose of making this inspection it would be necessary to go in an easterly direction along the sidewalk from the point where he was cleaning the switch lamp (R. 81). Petitioner did not so move along the sidewalk upon seeing the approaching train, but stepped backwards into the ditch (R. 40, 70, 82).

ARGUMENT.

I.

There Is No Important Question of Federal Law or Conflict of Decisions.

Petitioner lists as one of the questions presented for review, "* * * and whether his (petitioner's) negligence should be considered as a complete defense to the action, or merely in reducing the amount of recovery" (Petition, p. 5). There is nothing in the opinion below to indicate that the Supreme Court of Missouri entertained any concept that contributory negligence was a complete defense, as a reading of that opinion will disclose (Petition, Appendix A). Petitioner refutes his own contention at pages 10 and 11 of the Petition, where he states:

> "Thus it is demonstrated that the Missouri court determined as a matter of law that plaintiff's negligence was the *sole cause* of his injuries. This was a jury question, under recent decisions of this court.
>
> "*In other words the Supreme Court of Missouri holds, as a matter of law: First, that there was no negligence on the part of defendant;* and, second, that if there was negligence there was no causal connection between that negligence and plaintiff's injuries, but that plaintiff was the author of his own injury, or the court might well have said, misfortune." (Emphasis supplied).

Petitioner also urges that the Supreme Court of Missouri gave effect to the doctrine of assumption of risk (Petition, pp. 14 to 18, inclusive). The best answer to this contention is found in the opinion itself, where the Court states:

"In Tiller v. Atlantic Coast Line R. Co., 87 L. ed. 610, 318 U. S. 54, the Court held that every vestige of assumption of risk had been obliterated by the Federal Employers' Liability Act." (Petition, Appendix A, p. 7A).

It is respectfully submitted that the Supreme Court of Missouri was under no misapprehension as to either the effect of contributory negligence, as a mitigating factor only, under the Federal Employers' Liability Act, or as to the complete abolition of the doctrine of assumption of risk under that Act.

In presenting his case on appeal to the Supreme Court of Missouri, petitioner conceded that he was not entitled to have his case submitted to the jury unless there was substantial evidence from which reasonable inferences could be drawn that (1) respondent had negligently breached its duty to furnish petitioner a reasonably safe place to work, and (2) that respondent's negligent breach of that duty directly or proximately caused, in whole or in part, petitioner's injury. Such concession was consonant with the historic cause of action for negligence and the Federal Employers' Liability Act, under which this suit was brought, which is based on negligence. Such statements were altogether congruous with the principles of negligence and causation as lawyers and courts deal with them from day to day. Unless this Court is to superimpose upon those fundamental tenets as adopted and declared by Congress, a new and wholly different concept of the correlative rights and duties between employer and employee, it should, we respectfully submit, refuse to review the decision of the Supreme Court of Missouri in this case.

As stated so effectively by Mr. Justice Frankfurter in his dissenting opinion in *Rogers* v. *Missouri Pacific Rail-*

road Co., 352 U. S. 500, 1 L. ed. 2d 493, 527, 77 S. Ct. 443, and other cases decided with it, at l. c. 527:

> "The rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court, and is as equally applicable to negligence cases as to any other type of case. Perhaps a word should be said about the basis of the cause of action under the Federal Employers' Liability Act. Liability under the Act is based on negligence. As far as the substantive cause of action is concerned, this is the historic cause of action for negligence as it has developed from the common law. It involves the same general concept on which is based every 'negligence case' in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges."

If this Court were to deliberate upon and decide every set of facts presented to it in cases arising under the Federal Employers' Liability Act, then the role of the trial and appellate courts, both state and Federal, would indeed be a dubious one in this large area of litigation. More and more frequently this Court is faced with petitions for writs of certiorari in cases that turn on questions pertaining to the *judgment of facts*. Such is the case here. An experienced trial judge and six able Judges of the Supreme Court of Missouri—all save one—concurred in finding that petitioner did not make a submissible case and that respondent was entitled to a directed verdict at the close of petitioner's evidence. In deciding this question, both the trial court and the Supreme Court of Missouri were performing a duty entrusted to them by Congress when it placed concurrent jurisdiction of Federal Employers' Liability Act cases in

the State courts. Unless it can be fairly said that these Judges were unreasonable or capricious in assessing the evidence in this case, wherein is there justification for this Court to grant the writ which petitioner urges upon it? Mr. Justice Harlan, with compelling logic, covered the point in his dissenting opinion in *Rogers* v. *Missouri Pacific Railroad Co.*, *supra*, and other cases decided with it, when he said, at l. c. 519:

> "For my part, to overturn the judgments below simply involves second-guessing the Missouri Supreme Court, the Court of Appeals for the Seventh Circuit, and the Court of Appeals for the Second Circuit, on questions of fact on which they brought to bear judgments neither capricious nor unreasonable, and on which they made a 'fair assessment of a record.'
>
> "I dissent also for another reason. . No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. The problem has always been one of judgment, to be applied in view of the purposes of the statute. It has, however, been common ground that a verdict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. Moore v. Chesapeake & O. R. Co., 340 U. S. 573, 95 L. ed. 547, 71 S. Ct. 428."

That the Supreme Court of Missouri appraised the facts fairly and with full knowledge of the provisions of the Federal Employers' Liability Act and the decisions of this Court construing it, is clearly evidenced by the opinion of that Court (Petition, Appendix A, pp. 1A to 7A, inclusive). It seems appropriate, at this point, to quote from the dissenting opinion of Mr. Justice Frankfurter in *Stone* v. *New York, Chicago & St. L. R. Co.*, 344 U. S. 407, 97 L. ed. 441, 447, 73 S. Ct. 358, where it is stated:

> "Congress very early gave emphatic proof that this was not the Court to sit in judgment upon the State courts every time a majority of this Court might view the evidence differently than the State court. In 1916 the Congress explicitly withdrew Federal Employers' Liability cases from the Court's mandatory jurisdiction and left them to be reviewed only when a determination by a State court involved a federal question of substance. 39 Stat. 726, 727."

Whether or not this Court might or might not agree with the trial court and with the overwhelming majority of the Supreme Court of Missouri, in their assessment of the record, should not be determinative in denying or granting the writ of certiorari. There is no reason to assume, and certainly there is nothing in the record to indicate, that in performing their duty they brought to bear anything other than a fair judgment of the facts. Likewise, there is no valid reason to believe that the Supreme Court of Missouri is either untutored in or unmindful of the duties entrusted to it by Congress in enforcing the Federal Employers' Liability Act. Moreover, the opinion below clearly manifests both a knowledge of and a proper regard for the decisions of this Court.

We respectfully submit that there is neither an important federal question nor a conflict of decisions here involved which would warrant a review by the Court and, therefore, the writ should be denied.

II.

The Decision Below Is Clearly Correct.

As hereinbefore indicated, petitioner has narrowed the allegations of negligence pleaded to the single charge that respondent was negligent in failing to furnish a reasonably safe place of work. If we assume that petitioner

was injured at a "place of work", within the meaning of the Federal Employers' Liability Act, then, of course, a duty arose on the part of respondent to use reasonable care to make such place of work reasonably safe. It would seem, however, that a place is not necessarily converted into a "place of work" simply because an employee happens to choose that place for the performance of his duties. Suppose, for example, that petitioner had decided to clean the lamp on the right of way of the Kansas City Southern Railroad, adjoining respondent's right of way on the east, and had there stepped into a ditch (R. 17)? Surely it would not be a tenable position that respondent would, under such circumstances, have had a duty to make such place reasonably safe as a place of work for petitioner. Yet, there is, in principle, no real difference between that situation and the one presented here. Logically, the first inquiry should be whether the place of injury is a place where the employee is required to work or, at least, one which the employer would reasonably expect to be used by its employees in the performance of their duties. In the instant case there was not even a scintilla of evidence that petitioner was ever told to clean the switch lamp, or perform any other duties, on the sidewalk or near the ditch. The only evidence that even touches the proposition is petitioner's negative testimony that he was never told not to clean the lamp on the sidewalk (R. 38). There was no evidence whatsoever that any of respondent's employees were ever ordered to use, or that they did use, the public sidewalk referred to in evidence in the performance of their duties. As stated in *Kenney* v. *Boston & Maine R. R.*, 33 Atl. 2d 557, 560, 92 N. H. 495, wherein a brakeman was killed when he fell as he alighted from a train at night on an unrailed bridge:

"The deceased was not performing such work that the bridge was his contemplated work-place, findably requiring a rail for his protection * * *."

Although petitioner testified on redirect examination that an assistant foreman had seen him working on the sidewalk "at that particular place" (R. 76, 77), on cross examination he denied that he was "back by the ditch" on the previous occasions (R. 68, 69). It is also noteworthy that petitioner did not testify as to when, during the eleven years he was employed as a lamp tender, respondent's assistant foreman had seen him. Was it eleven years before the occasion in question? The record is silent on this point. Should respondent, under the evidence in this case, be held to have reasonably foreseen that petitioner would squat on the sidewalk, at a place in close proximity to, and with his back toward, the clearly visible ditch? The switch stand was located north of the sidewalk, 6 feet and 4 inches from the east rail of the track (R. 24, 65). The ditch was on the south side of the sidewalk (R. 24). Petitioner voluntarily chose to clean the switch lamp at a point near the ditch, 13½ feet from said rail (R. 66, 67, 79, 84). He admitted that he could have cleaned the lamp anywhere and that at many places where he cleaned lamps there were no sidewalks (R. 85, 86).

Even if it is assumed that respondent could reasonably have foreseen that petitioner would clean the switch lamp on the sidewalk, there was no reason to anticipate that he would choose a place near an open, familiar ditch (R. 85, 86). The test of foreseeability in determining negligence is a well established principle of law under the Federal Employers' Liability Act, as well as in common law cases. Petitioner so noted in his brief which was filed in the Supreme Court of Missouri. As stated in *Wolfe* v. *Henwood*, 8 Cir., 162 F. 2d 998 (Certiorari denied 332 U. S. 773, 92 L. ed. 357, 68 S. Ct. 88), at l. c. 1000:

> "But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act."

It is earnestly submitted that it was not incumbent upon respondent to guard against such unusual use of the sidewalk as that made by petitioner, even if it were shown that respondent had a right of control over the public sidewalk and the right to erect a guard rail thereon. The situation is analogous to that in *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 239, 245, 64 S. Ct. 232, in that it was the unusual purpose and manner of the use of the sidewalk that brought about the injury. In the *Brady* case this Court stated, l. c. 245:

> "The Supreme Court of North Carolina was of the view that striking a derailer from the unexpected direction 'was so unusual, so contrary to the purpose' of the derailer that provision to guard against such a happening was beyond the requirement of due care. With this we agree."

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. ed. 497, 504, 69 S. Ct. 413, this Court was passing upon an entirely different factual situation than that involved here. It was stated in the majority opinion delivered by Mr. Justice Black, at l. c. 504:

> "We agree with this last quoted statement of the Utah court, and since there was evidence to support a jury finding that *employees generally had habitually used the board as a walkway*, it was error for the trial judge to direct a verdict in favor of respondents." (Emphasis supplied).

In *Palermo* v. *Luckenbach Steamship Co., Inc.*, 355 U. S. ....., 2 L. ed. 2d 3, 78 S. Ct. ....., cited by petitioner, this

Court was again dealing with an unlighted *walkway used by employees*, made dangerous by oil and grease.

Rogers v. *Missouri Pacific Railroad Co., supra,* on which petitioner leans so heavily, is also distinguishable. As has been cogently pointed out by the Supreme Court of Missouri in its majority opinion, "The circumstances surrounding the manner in which Rogers was injured were quite different from those in the case before us". The charge of negligence which this Court found was sustained by the evidence in the *Rogers case* was that Rogers was "*required to work at a place* in close proximity to defendant's railroad tracks, whereon trains moved and passed, causing the fire from said burning weeds and the smoke therefrom to come dangerously close to plaintiff and requiring plaintiff to move away from said danger." (Emphasis supplied).

The opinion below quotes from the majority opinion of this Court in the *Rogers case,* delivered by Mr. Justice Brennan (Petition, Appendix A, pp. 4A, 5A), as follows:

> "'The testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks and not, as here, by a workman on foot using a crude hand torch, *when that evidence is considered with the uncontradicted testimony that the petitioner was where he was on this narrow path atop the dirt "dump" in furtherance of explicit orders to watch for hot boxes,* supplied ample support for a jury finding that respondent's negligence played a part in the petitioner's injury. These were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that petitioner, in performing the duties required of him, would suffer just such an injury as he did. Common experience teaches both that a passing train will fan the flames of a fire, and that a person suddenly enveloped in flames and smoke will instinctively react by retreating from the danger

> and in the process pay scant heed to other dangers which may imperil him. In this view, it was an irrelevant consideration whether the immediate reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence.'" (Emphasis supplied by Supreme Court of Missouri).

In *Eckenrode* v. *Pennsylvania R. Co.*, 335 U. S. 329, 93 L. ed. 41, 69 S. Ct. 91, this Court affirmed the opinion of the lower court in 164 F. 2d 996, 3 Cir., wherein the Court of Appeals stated, at l. c. 1000:

> "Even if it may be inferred that he was trying to sand the tracks with it, it is too much to say that McGowan or other members of the train crew are to be charged with negligence in failing to anticipate this completely unexpectable operation on Eckenrode's part."

Just as respondent was not required to contemplate that petitioner would negligently choose a place on the sidewalk near the ditch to clean the lamp, it was not required to foresee further lack of care on the part of petitioner for his own safety in stepping backwards into the ditch. Such action was flagrant negligence and employers are not required to anticipate that experienced employees will act in utter disregard of their own safety. It should be noted that petitioner was faced with no emergency as was the petitioner in the *Rogers case*, who was retreating from enveloping flames and smoke when he fell. Petitioner Ferguson had ample time after he heard the train whistle to move safely to a place from which he could inspect the train, if in fact such movement was at all necessary. The train was still 200 feet away from petitioner when he saw it approaching and he was then 13½ feet from the track on which it was traveling (R. 39, 84).

He testified that it was moving slowly (R. 84). The engineer and fireman testified that the train was traveling approximately 8 to 10 miles per hour (R. 143, 154). There was no reason for haste and there was no reason for the plaintiff to move toward the ditch, the direction in which the train was traveling. By so doing he was not moving farther away from the track, which, according to his testimony, was what he should do to make a "running inspection" of the train. In the majority opinion below the Supreme Court of Missouri points out, at page 3A, Appendix A of Petition:

> "Plaintiff, in oral argument, conceded that the place to clean the lamp was not unsafe; also that the place to make the inspection of the train was not unsafe. But that the combination of the duties, that is, transferring from the duty of cleaning the lamp to that of inspecting the oncoming train, required him to move back to a position from which he could make the inspection; that in so doing, he stepped off into the ditch; that, therefore, the place was unsafe. To this we cannot agree."

For the reasons indicated above, it is submitted that there was no evidence of negligence on the part of respondent, but there are additional reasons why the Supreme Court of Missouri correctly stated that, "We hold that the record in this case is devoid of any evidence from which negligence on the part of the defendant may be inferred which contributed to cause plaintiff's injuries. The trial court was, therefore, right in directing a verdict for the defendant. The judgment is affirmed." (Petition, Appendix A, p. 7A).

Was not the existence of the street, sidewalk and open ditch a mere condition, under the circumstances shown in evidence, without legal causal connection to the alleged

injury to petitioner? In *Chesapeake and Ohio Ry. Co.* v. *Burton*, 217 F. 2d 471, 474, 4 Cir., a conductor was attempting to signal motorists, after the train had stalled on the crossing and was struck by a motor vehicle. The Court there stated, at l. c. 474:

> "Burton decided himself on his course of conduct after the train stalled. He could easily have chosen a safe place or position from which he could have signalled with his torch to approaching drivers of motor vehicles. In such a situation any negligence of the railroad in stopping the train created a mere condition which had no causal connection to the injury received."

In *Reynolds* v. *Atlantic Coast Line R. Co.*, 336 U. S. 207, 93 L. ed. 618, this Court affirmed the decision of the Supreme Court of Alabama, 251 Ala. 27, 36 So. 2d 102, where that Court stated, at l. c. 106:

> "It is not alleged that he was not free to handle his own movements, or that any superior's orders required him to pursue the course of conduct which he did pursue. It cannot be said that the omission to provide sufficient and competent help was the primary moving cause which in the natural and probable sequence of events, and without the intervention of a new or independent cause, produced Reynolds' fall between the cars, and his death."

In this connection, we should also like to cite *Gill* v. *Pennsylvania Railroad Co.*, 3 Cir., 201 F. 2d 718, 721 (Certiorari denied 346 U. S. 816, 98 L. ed. 343, 74 S. Ct. 27). There the railroad employee was ordered to work beneath the racks in a box car. He had previously injured his left knee, which had required surgery and had disabled him for approximately seven months. He had returned to work shortly before the date of the injury in question. The

racks beneath which he was working were so slow that it required the plaintiff to hold his injured knee in an awkward position. His knee became cramped and painful, and being unable to stand up under the racks, he started to back out and stood up when he erroneously thought he was clear of the racks. The Court there held that, even assuming that the railroad was negligent, there was no causal connection between such negligence and the injury, and that, as a matter of law, the case should not have been submitted to the jury. The Court stated, at l. c. 721:

> "The immediate cause of the accident was succinctly stated by the plaintiff at the trial and by his counsel in his brief. We quote from the record:
>
> "'A. Well, I was trying to get out of the car, and I come out and I thought I was clear of the racks, and I raised my head up and hit my head.
>
> "'Q. In other words, you misjudged your position? A. Yes.'
>
> "There is nothing in the record to contradict this critical admission, and counsel in his oral argument so conceded."

True, petitioner Ferguson did not testify that he misjudged his position on the sidewalk, but the fact remains that in broad daylight he voluntarily stepped backward and into the ditch, with full knowledge of its existence and location (R. 40, 70, 82, 69). As stated by the Supreme Court of New Hampshire in *Kenney v. Boston & Maine R. R. Co.*, *supra*, at l. c. 561:

> "If he had known where he was and had stepped off as he did, his negligence would have been the sole proximate cause of his injuries and death."

Petitioner has now taken a rather startling position, one squarely opposed to that taken by him in the Supreme Court of Missouri, to-wit—that the Federal Employers' Liability Act "eliminates the question of causation" (Petition, p. 18). Note the sophistical statement that, "Now we

are to determine what injuries 'resulted' from the carrier's negligence, rather than what 'caused' the injury" (Petition, p. 19). Surely such expression can only grow out of a fruitless wandering in the wilderness of semantics. What is the difference in causal relation between "A caused B" and "B resulted from A"? Respondent submits that it is exactly the same difference as that between "A hit B" and "B was hit by A". The fact that the Supreme Court of Missouri did not subscribe to such a strained construction of the decisions of this Court as that now urged by petitioner, further demonstrates the correctness of the decision below.

CONCLUSION.

It is respectfully submitted that the petitioner had a fair hearing in both the trial court and the Supreme Court of Missouri, and that no right or privilege granted him under the Federal Employers' Liability Act has been violated. Rather, the evidence in this case does not sustain a right to recover under that Act and the Supreme Court of Missouri, *en banc*, properly so declared. Its decision was reached after careful consideration and pursuant to the duty imposed upon it to determine the sufficiency of the evidence.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Federal Employers' Liability Act, 45 U.S.C., Section 51, et seq.

Section 51 of said Act provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, sec. 1, 53 Stat. 1404."